Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STOUGHTON TRAILERS, INC.,
a Wisconsin corporation,
Petitioner,

vs.

PACE DESIGN & FAB., INC.,
a California corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

1. Where a corporate subsidiary of two parent corporations is dissolved and its assets and liabilities are transferred to a newly formed subsidiary, which transaction has no financial impact on third parties in pending litigation, does Fed. R. Civ. Proc., Rule 60, Relief from Judgment or Order, or Rule 25(c), Transfer of Interest, empower a District Court to fasten a $375,000 judgment liability on one of the two corporate parents?

2. For the mere nondisclosure of a corporation reorganization without financial loss or detriment to adverse parties in litigation, is it a violation of the due process clause under the Fourteenth Amendment of the United States Constitution and such a departure from accepted and usual course of judicial proceedings to warrant this Court's review, for the district court to impose upon a parent corporation a $375,000 penalty judgment under the guise of "relief" from fraud under Fed. R. Civ. Proc., Rule 60(b)?

PARTIES TO THE PROCEEDING

Petitioner Stoughton Trailers, Inc. ("Stoughton Trailers") is a Wisconsin corporation that does not have shares issued to the public. Stoughton Composites, Inc. ("Composites, Inc."), is a dissolved Wisconsin corporation, the shares of which were owned by Stoughton Trailers (80 percent) and by Alcoa (20 percent), a corporation whose shares are publicly traded. Stoughton Composites, LLC ("Composites LLC"), is a Wisconsin Limited Liability Company, which is owned by Trailers, Inc. (80 percent) and by Alcoa (20 percent)

Respondent Pace Design & Fab., Inc. ("Pace Design"), is a California corporation that does not have shares issued to the public.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order on Motion to Confirm Arbitration Award by the United States District Court for the Central District of California (the "District Court") was filed on June 20, 1996, and is unreported (Appendix F herein).

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit Decision") affirming the District Court Amended Judgment was filed on December 18, 1997, and is unreported (Appendix A herein).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals affirming the District Court Amended Judgment was filed December 18, 1997 (Appendix A herein). The Petition for Rehearing was denied by the Court of Appeals on January 27, 1998 (Appendix B herein). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES OF CIVIL PROCEDURE INVOLVED

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

The pertinent text of the following Rules of Civil Procedure is set forth in Appendix G:

Federal Rules of Civil Procedure, Rule 25(c).
Federal Rules of Civil Procedure, Rule 60(b).

STATEMENT OF THE CASE

1. The Arbitration Award.

This action for breach of contract arose out of a 1993 agreement between Pace Design & Fab., Inc. ("Pace Design"), and Stoughton Composites, Inc. ("Composites, Inc.") that provided for Pace Design to design and build a container assembly line in Broadhead, Wisconsin. Composites, Inc., was a corporate subsidiary organized by two stockholders, Stoughton Trailers, Inc. ("Stoughton Trailers"), and Alcoa, a publicly held, NYSE-listed company. Composites, Inc.'s ownership was held on a 80/20 basis by, respectively, Stoughton Trailers and Alcoa.

The agreement between Pace Design and Composites, Inc., was an arm's length business transaction. Neither parent company, Stoughton Trailers nor Alcoa, had any legal or financial involvement in their subsidiary's obligations in the transaction. A contract dispute resulted in Pace Design filing suit in a California state court against Composites, Inc. for recovery of alleged fees owed. Stoughton Trailers was not a party to the action.

The action was removed by Composites, Inc., to the United States District Court for the Central District of California. The parties to this action thereafter agreed to submit the dispute to binding arbitration and a retired judge was selected to arbitrate the dispute and make an award. The arbitrator issued an award on March 22, 1996. This award consisted of principal and interest totaling $375,000.

2. The Reorganization.

The state of Wisconsin in 1994 enacted legislation permitting the formation of limited liability companies. Pursuant to the agreement of its two shareholders, Stoughton Trailers and Alcoa, their subsidiary, Composites, Inc., was dissolved and reorganized into a limited liability company, Composites, LLC. The transaction resulted in a transfer to Composites, LLC of the assets and liabilities of Composites, Inc. All legal and financial requisites, including bank agreements, were maintained.

On December 1, 1995, Composites, LLC executed an "Assumption of Liabilities," by which it agreed to assume the liabilities of its predecessor in interest, Composites, Inc. Nothing concerning the reorganization was ever claimed to have been unlawful or wrongful under any law. Pace Design, the District Court, and the arbitrator were not, however, informed of the dissolution and reforming of the Composites' subsidiary into a different legal form. This "nondisclosure" served as the basis for the District Court to later add one, Stoughton Trailers, of the two parents of the Composite subsidiaries to the $375,000 judgment.

3. Proceedings Below.

Pace Design moved to confirm the award as a judgment against Composites, Inc. On June 24, 1996, the District Court entered an Order confirming the Award as a judgment (Appendix F herein) and also entered judgment in favor of Pace Design and against Composites, Inc. (Appendix E herein).

Composites, Inc., appealed the portion of that judgment that provided for post-judgment interest. This appeal was heard in the Ninth Circuit under Docket No. 96-56165.[1]

Pace Design began execution on its judgment against Composites, Inc., in Wisconsin and obtained a writ of execution against Composites, Inc., *and* Composites, LLC. Composites, LLC, not then being a party to the judgment, moved to delete itself from the judgment and the District Court for the Eastern District of Wisconsin ordered Composites, LLC deleted from the writ of execution. That decision is published in the official reports at 936 F. Supp. 599 (E.D. Wis. 1996).

Pace Design thereafter filed a motion in the District Court on August 29, 1996, to *amend* the judgment to add the company into which Composites, Inc., had reorganized, Composites, LLC, and also Stoughton Trailers, as *judgment defendants*. This was styled as a Rule 60 Relief from Judgment or Order.[2] Pace Design sought to add Stoughton Trailers, one of two parent corporations, under a Rule 60(b) motion on the basis that the *failure to disclose* the corporate reorganization was a "fraud."

Both Stoughton Trailers and Composites, LLC opposed the motion. The District Court granted the motion, adding not only Composites, LLC,[3] but also

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[1] The appeal was denied and is not pertinent to this Petition. It was heard with the subject of this Petition and the Ninth Circuit's discussion of that appeal comprises section II of the Ninth Circuit's Decision (Appendix A-2, 3).

[2] Because the original judgment was on appeal, Pace Design sought an indication from the district court on the authority of *Crateo, Inc., v. Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976).

[3] The proper successor in interest pursuant to FRCP, Rule 25(c) or FRAP, Rule 43(b).

against Stoughton Trailers, to the Amended Judgment. The District Court did so for the stated reason that to do otherwise would be an "injustice." (Appendix D herein) Stoughton Trailers, and Composites, LLC appealed. (No. 97-55032).

On December 18, 1997, the Court of Appeals filed its Memorandum Decision affirming the District Court's Amended Judgment in all respects. (Appendix A herein). Stoughton Trailers filed a Petition for Rehearing, which was denied on January 27, 1998 (Appendix B herein). Stoughton Trailers moved to stay issuance of the Mandate pending the filing of this Petition for Writ of Certiorari. This was granted on February 12, 1998, pursuant to FRAP, Rule 41(b) (Appendix C herein).

REASONS FOR GRANTING THE WRIT

1. Introduction.

It is recognized that it is a rare occasion in which this Court becomes involved with a particular Circuit's interpretation and application of the Federal Rules of Civil Procedure. And it is acknowledged that the district courts are accorded discretion in the administration of justice in every action.

But, it is also true that judges must follow the law. And where in the instance a single judge or a circuit panel has failed to follow the law, then this Court is empowered through the writ of certiorari to require the lower courts to do so. This is such a case.

The reorganization of Composites, Inc., *into* Composites, LLC, had no financial or legal effect upon the outcome of the District Court action. This fact was uncontested throughout the pendency of the District

Court case and brought to the attention of the lower courts at every step of procedure. But for Pace Design's being required to substitute or add the successor entity, Composites, LLC, a procedural step costing in the *hundreds* of dollars, there was never a financial impact upon Pace Design, and Pace has never contended there was. There was never any finding in the lower courts' proceedings that Stoughton Trailers *was* an *alter ego* of Composites, inc.

As we establish below, neither the District Court nor the Ninth Circuit articulated factual or legal reasons for the decision to add Stoughton Trailers to the judgment. Yet, the decision to do so had the immediate and proximate consequence of penalizing Stoughton Trailers $375,000 for the failure to "disclose" what in the consequence was immaterial.

2. The Ninth Circuit's Decision Is Devoid Of Any Law Supporting A Finding Of "Fraud" Including Reliance, Causation, Or Damages To Justify A $375,000 Penalty For Not Disclosing The Reorganization.

The Ninth Circuit's Decision concedes that Stoughton Trailers was not a party to the business dispute between Stoughton Composites, Inc., and Pace Design. (Decision, App. A3)[4] The failure to disclose the reorganization between Composites, Inc. and Composites, LLC was labeled a "fraud." Nothing in the Ninth Circuit's Decision, however, states that any statute, tort (under any law), or Rule of Procedure was infringed or violated by

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[4] All references are to the Court's Memorandum Decision except as noted.

the undisclosed reorganization. In any legally cognizable sense of the word, it did *not*.

The Court concluded that "In any event, the annual reports of SC, Inc. and Trailers show that the President, Secretary, and Board of Directors of the two entities were identical, and [that] it was Trailers which agreed to SC, Inc's stipulation with Pace to arbitrate." (Decision, App. A6)[5]

The law of California, which provided the substantive rule of law on whether a parent corporation is liable for the debts of its wholly owned subsidiary is not so. *Western Camps, Inc., v. Riverway Ranch*, 70 Cal.App.3d 714, 138 Cal.Rptr. 918 (1977). Furthermore, "identicality" of officers and directors has *never* been held in California to be a sufficient basis to hold a parent corporation automatically liable for the debts of its subsidiary. Again, the Courts below failed to comply with their duty to articulate factual reasons for their decision. This was done without a pretense of Due Process, and we request this Court issue a Writ of Certiorari commanding the Ninth Circuit to reverse it decision.

This Court will review application of the Federal Rules of Civil Procedure and statutes and the factors a district court will consider in granting "relief" *from* a judgment under Rule 60(b), and they must be extraordinary. *Liljeberg v. Health Services Acquisition Corp.* (1988 US) 108 S.Ct. 2194, 100 L.Ed.2d 855. (Failure of district judge to disqualify himself pursuant to 28 U.S.C. § 455(a) and motion under Rule 60(b) to vacate reviewed on certiorari.) Where a district court has failed to follow the law, there is present such an injustice that

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[5] They were not the same and, furthermore, no one, including Pace Design, alleged that Stoughton Trailers was a party to the arbitration agreement.

warrants this Court's review. Here, there was no articulation in compliance with the law and review is appropriate and essential to the fair application of the law.

Mr. James Hammis' use of a Stoughton Trailers letterhead to "forward" the agreement to arbitrate between Pace Design and Composites, Inc., had no legal effect or consequence and in the event meant nothing. The contract and dispute was between Pace Design and Composites, Inc., regardless of the form it was held in, and the parent, Stoughton Trailers, was not even a party to the civil action.

Specifically, in December, 1995, when the agreement to arbitrate the Pace Design and Composites, Inc., dispute was reached, if the ongoing dissolution of Composites, Inc., and formation of Composites, LLC had been disclosed, the *indisputable result* would have been the addition of Composites, LLC to the arbitration as a defendant.

Never in the District Court or in the Ninth Circuit did Pace Design suggest or allege that it would have done anything different.[6] Had Pace Design then sought to amend its complaint to include the parent, Stoughton Trailers, the issue of the liability of the parent for its subsidiary's liability would certainly have been tested and the attempt would have failed under any statutory or decisional law. By the lower courts' decisions, Stoughton Trailers was denied that opportunity.

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[6] The Ninth Circuit's Decision states that it was "unmoved" by Stoughton's argument that Rule 25(c) was the proper course and that Stoughton should have requested an "evidentiary" hearing. The facts, however, *were* undisputed and the suggestion of such a purposeless exercise does not make the final result square with the law.

Pace Design never alleged, because it could not, that it contracted with Stoughton Trailers. This issue — the absence of any factual relationship between the parent and the subsidiary's obligations to Pace Design — were raised in the District Court as well as in the Ninth Circuit.

And, under established precedent, the hearing on the motion to add Stoughton Trailers to the judgment could solely have been one of *successor liability*:

> "the transferee's right to a hearing under the due process clause is limited to a determination of whether he is a successor in interest and thus liable on the judgment, and not whether he committed the acts with which the transferor was charged)." *3M v. Eco Chem, Inc.*, 757 F.2d 1256 (Fed. Cir. 1985), at 1264.

It was obvious — and undisputed — that Composites, LLC would have been the proper party to be substituted on motion for Composites, Inc,. It was equally clear that Stoughton Trailers was not.

The Court of Appeals in *Luxliner P.L. Export v. RDI/ Luxliner*, 13 F.3d 69 (3d Cir. 1993), expressly held that Rule 25 — which Pace Design avoided labeling its motion for obvious reasons — may *not* be used as a substitute for resolving or determining questions of fact that are summary judgment material:

> "Rule 25(c) "does not require that anything be done after an interest has been transferred." See 7C Wright, Miller, & Kane, Federal Civil Procedure (hereinafter "Wright & Miller") §1958 at 555 (2d ed. 1986). When a

defendant corporation has merged with another corporation, for example, the case may be continued against the original defendant and the judgment will be binding on the successor even if the successor is not named in the lawsuit. . . . Although substitution is usually effected during the course of litigation, substitution has been upheld even after litigation has ended as long as the transfer of interest occurred during the pendency of the case. See, e.g., *Bamerilease Capital Corp. v. Nearbury*, 958 F.2d 150, 153-54 (6th Cir. 1992) (affirming substitution in the context of proceeding to enforce a settlement agreement); *Arnold Graphics Industries, Inc. v. Independent Agent Center, Inc.*, 775 F.2d 38, 40 (2d Cir. 1985) (affirming district court's substitution of successor corporation for original defendant after entry of judgment).

Because joinder or substitution under Rule 25(c) does not ordinarily alter the substantive rights of parties but is merely a procedural device designed to facilitate the conduct of a case, a Rule 25(c) decision is generally within the district court's discretion. . . . To determine whether an entity is a transferee of interest so as to trigger this discretion, however, a district court's mission is one of applying law to facts. We review the

> district court's factual findings for clear error; its application of the law, and the manner in which it finds facts under the law, are subject to plenary review. *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 749 (3d Cir. 1990)." 13 F.3d at 71, 72.

In the lower courts, the undisputed facts prevented under any theory of law Stoughton Trailers from being considered a successor or alter ego — yet that was the effect of the rulings.

State substantive law, of course, determines whether there was any legal basis for Stoughton Trailers to be considered by the District Court as a successor of Composites, Inc. *United States v. Polizzi*, 500 F.2d 856, 907 (9th Cir. 1974). Since Stoughton Trailers was conclusively not a successor, the only conceivable theory of its addition as a defendant in this case would have been as an "alter ego." At best, the lower courts' rulings treated the motion as a disguised motion for summary judgment for which no court could rationally find the facts were undisputed.

Certainly, on the undisputed facts, there was no "injustice " in the relationship between Pace Design and Stoughton Trailers. Indeed, there was no relationship: The shareholder — one of two — had nothing to do with the design contract. And, Pace Design was not "innocent" of knowledge of Composites, Inc.'s financial position at any time. This was an uncontradicted fact that Pace Design never even bothered to contest in the district court.

The only evidence before the district court was that nothing was conditioned upon Stoughton Trailers guaranteeing obligations of its partially owned subsidiary.

Insofar as Composites, Inc.'s ability to respond to the judgment is concerned, Pace Design knew all the time that it was dealing with an ill-liquid party. Knowledge of the capacity and financial condition of the other party to a contract is a key factor in any contract dispute where plaintiff would fasten liability on a shareholder such as Stoughton Trailers. *Western Camps, Inc., v. Riverway Ranch*, 70 Cal.App.3d 714, 138 Cal.Rptr. 918 (1977).

3. The Decision Adding Stoughton Trailers To The Judgment Debt Of Its Partially Owned Subsidiary Was Such A Departure From Accepted And Usual Course Of Judicial Proceedings As To Warrant This Court's Issuance Of Its Writ Of Certiorari.

The Ninth Circuit's Decision was without precedent and said *nothing* concerning whether the traditional elements of fraud were present so as to justify imposition against the parent the judgment against the subsidiary. Included in the action, procedurally or substantively, for fraud are the requisites that a party *relied* to its detriment and that there are *consequent damages* the result of the fraud.

The Ninth Circuit's Decision studiously omits the burden of proof on Pace that was likewise ignored by the District Court, namely, clear and convincing evidence to establish fraud. *Assman v. Fleming*, 159 F.2d 332 (8th Cir. 1947) at 336.

Pace Design never articulated a legal theory to join one of two corporations that owned the subsidiary — in whatever form it was constituted. For the mere non-disclosure — howsoever it may be characterized — of

the reorganization, Stoughton Trailers has been penalized $375,000. That is unjust and was a violation of Stoughton Trailers' due process rights.

The wrong complained of by Pace Design throughout the District Court and appellate proceedings was that it had been the victim of a "fraud." That so-called fraud was a corporate reorganization. That reorganization was not disclosed. Had it been disclosed, the end result would have been a judgment in the District Court against Composites, Inc., and Composites, LLC., which would have been added without objection by a *properly* filed Rule 25 motion.

The Ninth Circuit's Decision omits both the legal elements of reliance and proximately caused damages as well as any discussion of a factual basis that would establish them. It was unprecedented *and* unwarranted and without any rational basis in law.

We therefore request this Court issue its writ to compel the lower courts require a hearing on the extent and nature of any damages *actually sustained* as a result of the nondisclosure. Imposition of a $375,000 penalty judgment against Stoughton Trailers was an indisputable taking away of its property without the due process required by the Fourteenth Amendment.

CONCLUSION

The District Court's adding Stoughton Trailers to the amended judgment of its partially owned subsidiary and the Court of Appeals' affirmation of that amended judgment violated the rules of civil procedure and were such departure from *accepted norms* of judicial proceedings as to warrant issuance of the Writ of Certiorari by this Court. We request the Court issue the Writ.

DATED: March 16, 1998.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
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U.S. COURT OF APPEALS

PACE DESIGN & FAB, INC.,
a California corporation,
Plaintiff-counter-defendant - Appellee,
v.
STOUGHTON COMPOSITES, INC.,
Defendant-counter-claimant - Appellant.

Nos. 96-56165, 97-55032

D.C. No. CV-94-04869-AWT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted December 3, 1997
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: HALL, BRUNETTI, and RYMER,
Circuit Judges.

Stoughton Composites, Inc. (SC, Inc.) appeals the district court's order adding postjudgment interest to the amount awarded to Pace Design & Fab, Inc. (Pace) by an arbitrator. SC, Inc., Stoughton Composites, LLC (LLC), and Stoughton Trailers, Inc. (Trailers) appeal the judgment amended pursuant to Rule 60(b) to include LLC and Trailers as defendants. We affirm.

I

Pace argues that both appeals should be dismissed because the parties agreed to waive "their respective rights to appeal the arbitrator's award." However, SC, Inc. does not appeal the arbitrator's award, but instead challenges that part of the district court's confirmation of the arbitration award in which postjudgment interest was awarded; and LLC and Trailers (who were not parties to the Arbitration Agreement) appeal the district court's amended judgment adding them as new parties. Therefore, neither appeal is within the Agreement's waiver provision.

II

SC, Inc. argues that the district court erred in adding postjudgment interest to the award because the parties stipulated "that the maximum award that [Pace] can recover on its complaint is $375,000." We disagree that this caps anything but what the arbitrator could award on the complaint.

The parties also stipulated "that any award shall be paid within thirty (30) days of the arbitrator's decision

and if not paid within said thirty (30) days may be converted into a judgment." No payment was made. Pursuant to 28 U.S.C. § 1961, the allowance of postjudgment interest is mandatory for any money judgment. *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 58 (9th Cir. 1984). Postjudgment interest serves the purpose of compensating a successful plaintiff for not being paid during the time between award and payment. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Thus, it does not increase the size of the award beyond the cap in this case, but instead protects its value over time.[1]

III

We believe the district court was well within its discretion in amending the judgment. Otherwise there would be the inequitable result of a defendant misleading the arbitrator, the court, and Pace to avoid paying the judgment.

SC, Inc. and Pace got into a dispute which they agreed to resolve by arbitration. James E. Hammis (the corporate secretary of SC, Inc., LLC and Trailers) returned a signed Stipulation for Binding Arbitration by letter of November 29, 1995, on Trailers letterhead, under his signature as "General Counsel and Secretary" of Stoughton Trailers, Inc. On December 1, Hammis, as Secretary of SC, Inc., filed papers with the Secretary of

[1] We decline to consider Pace's argument that it is entitled to postarbitration interest from the date of the arbitral award (March 22, 1996) because this is not simply an alternative ground of supporting the award of postjudgment interest, but rather a ground for modifying the judgment to expand its entitlement. *See Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir. 1994) (declining to consider argument that would expand plaintiffs' rights when plaintiffs did not file a cross-appeal).

State of Wisconsin dissolving SC, Inc. on an expedited basis as of December 1. At the same time, he filed a consent to the use of SC, Inc.'s name by LLC, a limited liability corporation, also formed on an expedited basis. And Hammis, as Secretary of LLC ("Assignee"), filed an "Assumption of Liabilities" in which it was stated that LLC "agrees to assume, perform, pay and discharge when and as due all liabilities, debts or obligations of its predecessor in interest, STOUGHTON COMPOSITES, INC., a Wisconsin corporation, of any kind whatsoever . . . ."

Arbitration proceedings went forward, with no advice about the dissolution of SC, Inc. Indeed, a number of papers were filed on SC, Inc.'s letterhead and signed by Hammis, including a second stipulation required by the arbitration tribunal which was signed by the "Chief Operating Officer of SC, Inc." and Hammis.

After the award, and after judgment was entered by the district court confirming the award with postjudgment interest — when Pace sought to execute on the judgment and LLC's bank account was debited in the amount of $53,916.14 — Hammis (on Trailers letterhead) told the United States Attorney's office in Wisconsin that SC, Inc. had been dissolved December 1, 1995, and had no assets. He also represented that the LLC bank account is not an asset of SC, Inc. and that SC, Inc. is not also known as LLC. Pace asked the District Court for the Eastern District of Wisconsin to decide that LLC was a successor in interest of SC, Inc., which the court declined to do in deference to the Central District of California where Pace's motion to seek indication was pending. Because the judgment upon which the writ was based was not entered against Stoughton Composites or LLC, the court ruled that the writ of execution naming LLC was mistaken. However, the court's published decision notes that SC, Inc.

(represented by Hammis) denied that SC, Inc. is "also known as" Stoughton Composites or Stoughton Composites, LLC and that LLC assumed or took responsibility for the position of SC, Inc. in the underlying action. *Pace Design 7 Fab, Inc. v. Stoughton Composites, Inc.*, 936 F.Supp. 599, 600 (E.D. Wis. 1996).

Meanwhile in California, Hammis filed a declaration in response to Pace's request for a *Crateo* indication,[2] which, among other things, averred that "[t]here is no document in existence to my knowledge by which Stoughton Composites LLC specifically assumed any liability in this action" and that "[t]here has never been any assumption of any liability or obligation by Stoughton Composites LLC with respect to this action."

Obviously these representations don't square with Hammis' filings with the Secretary of State in Wisconsin. Nor do they square with the implicit representation to the arbitrator and Pace that SC, Inc. was alive and well.[3]

For these reasons we are unmoved by the Stoughton companies' argument that Pace should have proceeded under Rule 25(c) of the Federal Rules of Civil Procedure (or FRAP Rule 43) instead of Rule 60(b). This was not a normal transfer of interest by merger or acquisition where substitution is appropriate.

By the same token, their argument that the district court should not have pierced the corporate veil or added LLC and Trailers as defendants without determining that they are alter egos of SC, Inc. misses the mark. Rule 60(b)(3) is concerned with a judgment infected by fraud

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[2] *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976)

[3] According to the corporate treasurer of all three entities, no capitalization was added to LLC after it was formed December 1, 1995.

or misconduct of an adverse party. If LLC or Trailers had thought there was a triable issue of fact that warranted an evidentiary hearing, they could have asked for one, but didn't. In any event, the annual reports of SC, Inc. and Trailers show that the President, Secretary, Treasurer, and Board of Directors of the two entities were identical, and it was Trailers which agreed to SC, Inc.'s stipulation with Pace to arbitrate.

Under these circumstances, we cannot see how the district court abused its discretion in determining that the judgment should be amended to include both LLC and Trailers.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 27, 1998
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

PACE DESIGN & FAB, INC.,
a California corporation,
Plaintiff - Appellee,
v.
STOUGHTON TRAILERS, INC.,
a Wisconsin Corporation;
STOUGHTON COMPOSITES, LLC,
a Wisconsin Limited Liability Co.,
Defendants - Appellants.

No. 97-55032

D.C. No. CV-94-04869-AWT

ORDER

Before: HALL, BRUNETTI, and RYMER,
Circuit Judges.

Appellant Stoughton Trailers's petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 12, 1998
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

PACE DESIGN & FAB, INC.,
a California corporation,
Plaintiff - Appellee,
v.
STOUGHTON TRAILERS, INC.,
a Wisconsin Corporation;
STOUGHTON COMPOSITES, LLC,
a Wisconsin Limited Liability Co.,
Defendants - Appellants.

No. 97-55032

D.C. No. CV-94-04869-AWT

ORDER

Before: HALL, BRUNETTI, and RYMER,
Circuit Judges.

The motion for stay of mandate filed February 4, 1998 by appellant Stoughton Trailers, Inc., is GRANTED. Pursuant to Fed. R. App. P. 41(b), the issuance of the mandate is stayed for thirty days from the date this order is filed. Thereafter, the mandate shall issue or the stay of the mandate shall continue as directed by Fed. R. App. Proc. 41(b).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
Clerk, U.S. District Court
DEC 2 1996
Central District of California
By Deputy

FILED
Clerk, U.S. District Court
NOV 27, 1996
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

PACE DESIGN & FAB, INC.,
a California corporation,
Plaintiff,

v.

STOUGHTON COMPOSITES, INC.,
a Wisconsin Corporation;
STOUGHTON COMPOSITES, L.L.C.,
a Wisconsin corporation., and
STOUGHTON TRAILERS, INC.,
a Wisconsin corporation,
Defendants.

No. CV-94-4869-AWT
C.A. No. 96-56165

AMENDED JUDGMENT

In accordance with the Order of Indication signed on October 28, 1996, and filed on October 30, 1996, and the Order of the United States Court of Appeals for the Ninth Circuit ordering a limited remand of the appeal in this case, filed with that Court of November 14, 1996,

the Judgment entered on June 24, 1996, is amended, as follows:

IT IS ADJUDGED:

1. The arbitrator's award rendered in this case on March 22, 1996, in the amount of $375,000.00 is hereby CONFIRMED.

2. The arbitrator's award shall not accrue or be credited with any pre-judgment interest beyond that already awarded by the arbitration, *i.e.*, up to the maximum of $375,000.00

3. Plaintiff PACE DESIGN & FAB, INC., a California corporation, shall recover from defendants STOUGHTON COMPOSITES, INC., a Wisconsin corporation, STOUGHTON COMPOSITES, L.L.C., a Wisconsin corporation, and STOUGHTON TRAILERS, INC., a Wisconsin corporation, jointly and severally, the sum of $375,000.00, together with its costs of suit in the sum of $____.

4. Pursuant to 28 U.S.C. § 1961(a), this Amended Judgment shall bear interest at the rate of 5.62 percent per annum from the date of entry of the original Judgment on June 24, 1996.

Dated: Nov. 25, 1996.

/s/ A. WALLACE TASHIMA
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by Designation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
Clerk, U.S. District Court
JUN 24, 1996
Central District of California
By Deputy

FILED
Clerk, U.S. District Court
JUN 20, 1996
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

PACE DESIGN & FAB, INC., etc.,
Plaintiff,
v.
STOUGHTON COMPOSITES, INC., etc., et al.,
Defendants.

No. CV-94-4869-AWT

JUDGMENT CONFIRMING
ARBITRATION AWARD

In accordance with the Order on Motion to Confirm Arbitration Award, signed and filed concurrently herewith,

IT IS ADJUDGED:

1. The arbitrator's award rendered in this case on March 22, 1996, in the amount of $375,000.00, is hereby CONFIRMED.

2. The arbitrator's award shall not accrue or be credited with any pre-judgment interest beyond that

already awarded by the arbitrator, *i.e.*, up to the maximum of $375.000.00.

3. Plaintiff shall recover of defendant the sum of $375,000.00, together with its costs of suit in the sum of $_____.

4. Pursuant to 28 US.C. § 1961(a), this Judgment shall bear interest at the rate of 5.62 percent per annum from the date of its entry.

Dated: JUN 05 1996.

/s/ A. WALLACE TASHIMA
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by Designation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
Clerk, U.S. District Court
JUN 24, 1996
Central District of California
By Deputy

FILED
Clerk, U.S. District Court
JUN 20, 1996
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

PACE DESIGN & FAB, INC., etc.,
Plaintiff,

v.

STOUGHTON COMPOSITES, INC., etc., et al.,
Defendants.

No. CV-94-4869-AWT

ORDER ON MOTION TO CONFIRM ARBITRATION AWARD

Before the court is plaintiff's motion for order confirming arbitration award. Defendant agrees that plaintiff is entitled to a judgment of confirmation, but disputes that plaintiff is entitled to either pre or post-judgment interest.[1] Plaintiff contends that it is entitled to both pre and post-judgment interest.

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[1] Other than the interest ordered by the arbitrator up to the maximum limit of an award in favor of plaintiff.

The stipulation for binding arbitration, which was drafted by plaintiff's counsel, does not mention interest, either pre or post-award or judgment. The stipulation does contain the following two paragraphs that bear on the interest issue:

(4) The parties agree that the maximum award that Plaintiff can recover on its complaint is $375.000.00 with a minimum of zero;

* * *

(6.) The parties agree that any award shall be paid within thirty (30) days of the arbitrator's decision and if not paid within said thirty (30) days may be converted into a judgment.

The arbitrator issued his award on March 22, 1996. He awarded to plaintiff $375.000.00, together with interest thereon at the rate of $95.72 per day from February 15, 1994 until paid. Pace is entitled to recover such sum but not to exceed the maximum stipulated amount of $375.000.00 as damages resulting from Stoughton's breach of its contractual obligations.[2]

It is obvious that the arbitrator's interpretation of the stipulation was that the cap on any award to plaintiff includes pre-award interest. The court accepts that interpretation as a reasonable one and within the province of the arbitrator. The next question then is whether the arbitrator's award should bear pre-judgment interest. This question is virtually the same as pre-award interest and should be answered in the same manner: No pre-judgument [*sic*] interest accrues on the award in excess of the cap. The cases cited by plaintiff are inapposite because none involves an agreement like this one.

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[2] Defendant also contends that the daily interest figure of $95.72 is erroneous. However, any mistake in this regard is inconsequential, if the arbitrator's award, including pre-award interest, is limited to $375.000.00.

It is reasonable to read the provisions of the stipulation together to provide that (1) no pre-judgment interest accrues, but that (2) if the award is not paid within 30 days, it "may be converted into a judgment." Thus, plaintiff is protected from further delay by its ability to convert the award into a judgment. This accomplishes two things for plaintiff: (1) It enables plaintiff to commmence [*sic*] judgment enforcement proceedings; and (2) the award commences to accrue interest from the date of its entry as a judgment. While the stipulation is silent on post-judgment interest, it is also silent on execution or other judgment-enforcement procedures. The court finds that the stipulation's cap on any award to plaintiff was not intended to preclude ordinary post-judgment interest any more than the stipulation's silence on post-judgment enforcement procedures was intended to prevent plaintiff from enforcing the judgment. Therefore, the court concludes that the judgment should bear interest from the date of its entry as provided in 28 U.S.C. § 1961(a) Judgment shall be entered consistent herewith.

IT IS SO ORDERED.

Dated: JUN 05 1996.

/s/ A. WALLACE TASHIMA
A. WALLACE TASHIMA
United States Circuit Judge

FEDERAL RULES OF CIVIL PROCEDURE

Rule 25. Substitution of Parties

. . . .

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule

Rule 60. Relief From Judgment or Order

. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .